The power of the Postmaster General was checked by an injunction in American School of Magnetic Healing v. McAnnulty, 187 U. S. 94. In that case, Mr. Justice Peckham applied the rule of law as follows, p. 110:

> "The Postmaster General's order, being the result of a mistaken view of the law could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto, until some action of the court. In such a case as the one before us there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts), and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, **yet such decision, being a legal error, does not bind the courts.**"

Wadsworth v. Boysen, 148 Fed. 771 (Nov. 23, 1906), C. C. A., 8th Circuit, was a suit to enjoin an Indian Agent from obstructing plaintiff from prospecting for the purpose of selecting mineral lands thereon. Demurrer to bill overruled. Temporary injunction granted—on appeal—affirmed.

Before Sanborn and Van Devanter, Circuit Judges, and Philips, District Judge.

The opinion by Philips, District Judge, after citing

authorities, affecting the title to land, notably Minnesota v. Hitchcock, 185 U. S. 377, draws the distinction between cases, and cites most of the leading cases, *contra*, as follows:

> "The case at bar falls within that class where the individual complainant seeks redress against one or more persons for an invasion of his property rights, and who pretend to be acting under a warrant of some federal statute or official, in which the complainant asserts that neither the statute nor the public law confers any such right upon the wrongdoer. As said in Noble v. Union River Logging Railroad, 147 U. S. 172:
>
> " 'If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a *mandamus* if he refused to do an act which the law plainly required him to do.' "

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72, before Sanborn and Smith, Circuit Judges, and Trieber, District Judge, was an appeal from the District Court for the District of South Dakota. The suit was by the Belle Fourche Valley Water Users' Association against Frank C. Magruder and others. From an order refusing to set aside a restraining order and granting an interlocutory injunction, defendants appeal. Opinion by Sanborn, Circuit Judge, p. 74 *et seq.*

> "(3) Another objection to the complaint is that it evidences a cause of action against the United States. This contention is presented in numerous forms, such as that the defendants are the officers of the United States and their acts are the acts of the United States, that an injunction against

their acts would constitute an interference with the use and possession of the property of the United States, the water of its reservoir, and would compel specific performance of its contracts.

* * * * *

If the averments of the complainant are true, and in deciding the question now under consideration they must be assumed to be so, these acts are unauthorized by and contrary to law. **They are, therefore, not the acts of the United States, or a suit to interfere with its property,** or a suit to compel specific performance of its contracts."

In closing his opinion Judge Sanborn says, p. 82:

"(6) **The controlling reason** for the existence of the right to issue an interlocutory injunction is that the Court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before these claims can be investigated and adjudicated.

"**A preliminary injunction maintaining the existing situation may properly issue whenever the questions of law and fact to be ultimately determined in the suit are grave and difficult,** and injury to the moving party will be certain, great, and irreparable if the motion is denied, while the loss and inconvenience to the opposing party will be inconsiderable."

The very latest case in point of time, and one almost identical with the case at bar, is United States Harness Co. v. Graham, *et al.*, in the District Court of the U. S for the N. Dist. of West Va. (*Supra.*)

THE UNITED STATES A TRADER; NOT A GOVERNMENT.

In the case of South Carolina v. United States, 199 U. S. 43, Mr. Justice Brewer makes some pertinent contrasts—applicable to the case at bar—between the exercise of governmental functions and functions of a private nature in which the State, the Government, engages as a business.

To like effect is the language of Chief Justice Marshall in Bank of U. S. v. Planter's Bank of Georgia, 9 Wheat. 904, where he said:

> "'It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that Company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

These words are quoted and followed in many cases; *e. g.*

Bank of Kentucky v. Wister, 2 Pet. 318;
Briscoe v. Bank of Ky., 11 Peters 256, 323;
Louisville R. R. v. Letson, 2 How. 304, 308;
Panama R. R. v. Curran, 256 Fed. 772. (C. C. A.)
Lord & Burnham v. U. S. S. B. E. F. C. (D. C.) 256 Fed. 957.

And see

The Pesaro, 277 Fed. 473 (D. C.) (December 13, 1921.)

To these adjudicated cases, add the language, in the same spirit, in the statute from which alone the Defendant John W. Weeks, as Secretary of War, derives his authority in this case; that is to say: The operation of the transportation facilities under the Secretary of War is to be "in the same manner and to the same extent as if such transportation facilities were privately owned and operated."

Sec. 201 (e) of the Transportation Act of 1920 is as follows:

"(e) The operation of the transportation facilities referred to in this section shall be subject to the provisions of the Interstate Commerce Act as amended by this Act or by subsequent legislation, and to the provisions of the 'Shipping Act, 1916,' as now or hereafter amended, **in the same manner and to the same extent as if such transportation facilities were privately owned and operated; and all such vessels while operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels, whether the United States is interested therein as owner, in whole or in part, or holds any mortgage, lien, or interest therein.**"

DEFENDANTS' AUTHORITIES.

The authorities cited by the defendants in their brief do not reach the gravamen of this case. Most of them

are cases in which the only question was the divesting of title to land or other property out of the United States; the title to which was in the United States.

Whether the contracts which are copied in full in the bill in this case, are or are not to be considered for all purposes as contracts with the United States, the fact remains that the subject matter of said contracts related to the carrying on of a private business venture for a profit, in which the United States was a "partner," within the meaning of Chief Justice Marshall in the case of

Bank of U. S. v. Planters Bank of Ga., 9 Wheat 904.

and the numerous cases which followed it, and are cited elsewhere in this brief.

And the United States was acting as a "Trader," and not in a "Governmental" capacity.

South Carolina v. U. S., 199 U. S. 43 (1905).

If the defendants combined together, and threatened to take away by force from the plaintiff the only property with which that partnership could be carried forward, etc., injunction is the only remedy.

We print in the Addenda the opinion rendered by the respondent, Honorable Charles B. Faris, Judge of the District Court, on the motion of the Government and of the defendants, to dismiss the cause on the ground that it was a suit against the Government. This opinion was rendered after the motion had been fully argued and briefed. We are submitting it not only because it fully answers the argument of the Petitioner, but also because it shows the Court's theory on which the point was decided.

CONCLUSION.

The attitude of the Government is rather inconsistent. Its law, under the Constitution, is the supreme law of the land and it expects and exacts the most scrupulous respect for it under severe penalties. Now here we have an army officer, Col. T. Q. Ashburn, directly violating his orders, committing a trespass and depriving a citizen, who has contracted in good faith with Government officials, of his property and rights, this in direct violation of the Constitution.

Col. Ashburn's orders were, in the event Mr. Goltra declined to surrender the towboats and barges, to "apply to the United States District Attorney at St. Louis REQUESTING THE INSTITUTION OF LEGAL PROCEEDINGS FOR THE RECOVERY OF SAID PROPERTY." Up to this point some regard seems to have been had for law by the Government officials, but that disappeared when the army officer, accompanied by a large force of men, took violent and forcible possession of the property, depriving the complainant of his day in court and of his property without due process of law.

If the officials of the United States Government demand respect for the law and require obedience, how can they expect such when they themselves have no respect for it? It is a dangerous thing for this Government to decide matters of private right with an army colonel and a force of men.

And now that the complainant has thwarted the il-

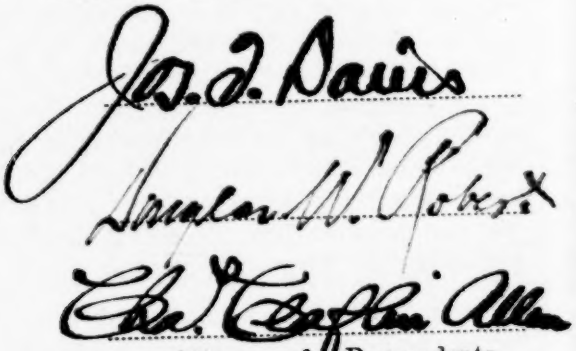
legal act, confessedly one in which the defendants had a guilty knowledge, else they would not have selected Sunday for it, a day when it might be thought impossible for the court to act, the Government itself comes into this Honorable Court and seeks its aid in preventing a hearing of the complainant's cause of action before one of its own courts. Thus it asks this Honorable Court its writ of prohibition to make sure that the original wrongful act of Col. Ashburn and the other defendants shall be successful and that the army of the United States, and not the courts, shall decide the rights of property of citizens in time of peace, a thing we feel sure this Honorable Court will refuse to do.

One thought more. Should the Government officials be successful in this proceeding what faith can its citizens have in its contracts in the future? Will any citizen rely upon written promises of the United States Government if they can be violated by its army without a moment's notice?

If there ever was a case which required a court of equity to act to prevent such usurpation of authority of which these defendants have been guilty, this is one. The acts of Secretary Weeks and Col. Ashburn together with the connivance of the United States District Attorney, was a tyrannical use of the military power of this Government. This same branch attempted the same methods in the United States Harness case and was thwarted there. If such acts, of which these men have been guilty, are permitted to go unchallenged, this country will be in no position to complain of the militaristic government of our late enemy, the German Empire.

We most respectfully ask that the preliminary writ be quashed and the petition for a writ of prohibition be denied.

Respectfully submitted,



Attorneys for Respondents.

ADDENDA.

DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE EASTERN DIVISION
OF THE EASTERN JUDICIAL
DISTRICT OF MISSOURI.

EDWARD F. GOLTRA,
Plaintiff,
VS.
WEEKS, ET AL.,
Defendants.
No. 6639
In Equity.

FARIS, J.

ORAL OPINION OF THE COURT ON MOTION TO DISMISS BILL.

Plaintiff entered into a charter-party, executed by the Chief of Engineers of the United States Army for the leasing or chartering of nineteen barges and four towboats, for a period of five years, with the option in lessee to purchase these vessels at the termination of the charter-party.

Upon completion of the construction of these vessels they were delivered to the plaintiff, and since have

been (until the time hereinafter mentioned) in his possession, and until that possession was interfered with by the defendants in the manner hereinafter more specifically set out.

The parties to this lease or charter-party are recited in the instrument thus:

> "This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee * * * party of the second part."

Plaintiff has sued here for an injunction, both to prevent further interference with his possession of these vessels, and to compel the restoration of them to his possession, charging in this behalf that, being on Sunday, March 25, 1923, in the peaceable and lawful possession of these vessels, that on said date defendant, Ashburn, acting under alleged orders of the defendant, Weeks, forcibly, and without warrant of law, and without due process, or any process of law whatever, came upon said vessels and drove off the servants and employees of plaintiff then in charge thereof, and took and towed these vessels down the Mississippi River, in an effort to get them beyond the jurisdiction of this Court; that such act of the defendant, Ashburn, and the defendant, Weeks, if, in fact, he ordered it to be done, is in contravention of the rights of plaintiff, for that plaintiff's property may not be

taken from him without due process of law, and without any process of law whatever, and in contravention of the charter-party under which plaintiff got and held these vessels, and in contravention of the constitutional rights of this plaintiff.

Defendants, Ashburn and Carroll, as District Attorney of the United States (the latter of whom is a mere formal party), were duly served with process. Defendant, Weeks, has voluntarily entered his appearance, and all of these defendants have moved to dismiss the bill of complaint, for that the United States, as the alleged owner of the vessels in dispute, and as the actual lessor thereof, is a necessary party defendant, without whose presence this action cannot proceed, and since the United States cannot be sued without its consent, this action must fail.

It was suggested on oral argument, that since the contract of charter reserves to the lessor the right to terminate the lease at any time for non-compliance with any of the terms or conditions thereof, whenever in the judgment of the lessor such non-compliance exists, such taking of the vessels was lawful, and no action whatever will lie against either defendants, or against the United States or against anyone else. This oral contention is not referred to in the motion before me, and scant consideration is devoted to it in the briefs. In any event, I think it may be dismissed with the suggestion that the judgment to be exercised by the lessor could not be exercised arbitrarily, or whimsically, or baselessly, and utterly without the existence of any breach on plaintiff's part, as the bill here alleges.

Upon the motion it is contended by defendants, that

not only does the language of the charter-party make plain that the United States is the lessor, but that inherently the relief which this Court must afford, if it give any, requires that the United States be a party, since valuable alleged vested rights of the latter must of necessity be determined as a condition precedent to the giving of any relief; that the charter-party itself, eliminating merely parenthetical recitations of the names of those representing it and designated to act for it, clearly names the United States as the lessor. If the clause designating the parties stood alone, the correctness of this contention would have to be conceded. Such doubt as is thrown upon its correctness, arises from the uniform use of the personal pronoun "he" in designating the lessor, and from the statutory and fact history of these vessels.

If the United States is the lessor, then plaintiff could not be heard to dispute its title, and the case must be dealt with upon the question whether this Court can afford any relief unless the actual lessor is before the Court as a party. Clearly, no permanent order of injunction can be entered here until it is determined whether the law and the facts adduced furnish a warrant for the judgment exercised by the Secretary of War in attempting to declare the charter-party at an end, or whether, if the facts do not warrant such action, a proper legal construction of the terms of the charter-party warrant such cancellation by the Secretary of War, absent any sufficient defaults on plaintiff's part in carrying it out.

I think it follows, that the lessor must be before the Court before the Court can dispose of the case, or the law must be held to be that the presence of the lessor in

Court is not necessary, even when valuable rights of the lessor are being determined, when such determination becomes necessary in order to protect the citizen in his constitutional rights against the flagrant violations of those rights by the officers who assume to act for the real lessor.

Reference to the origin and history of the money with which the vessels in dispute were built; to the statutes under which they were built, and to the statutes which provided for their control and ultimate disposition, may serve to throw some light upon the identity of the lessor.

The charter-party says, and the bill alleges (and by the bill, under the law, I am bound, for the uses and purposes of this motion to dismiss, and this is so, whether the allegations of the bill be true as a matter of fact or not), that all the money used to construct these vessels was furnished by the United States Shipping Board Emergency Fleet Corporation to the Chief of Engineers of the United States Army.

The Fleet Corporation was organized as a *quasi* private corporation (though, essentially, it was a public corporation) under the laws of the District of Columbia, on the sixteenth day of April, 1917. All of the fifty million dollars of capital stock of the Fleet Corporation was subscribed, taken and owned by the United States (Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 566).

By the act of Congress of June 5, 1920 (41 Stat. 988) the Fleet Corporation was continued in existence, but the title to practically all of the boats, barges, ships

and vessels formerly owned and held by the Fleet Corporation was transferred to the United States Shipping Board, which is a mere arm, or administrative bureau of the United States.

However, I am not able to construe the great mass of confusing statutes (confusing, I trust, because of lack of time of this Court, when faced by multitudinous duties, to properly read and understand them), which dealt with the many transportation facilities, by land and water, in an effort to unscramble them following the Great War, as including the vessels here in dispute among those which were transferred to the Shipping Board. On the contrary, I think it is clear that the title to them was left in the Fleet Corporation (so far as title vested in such Fleet Corporation by reason of its furnishing the money with which they were constructed), and, that, likewise the custody and control over them was left where the old statutes and existing contracts about them had placed such custody and control.

For the Act of June 5, 1920, excepted these vessels from the transfer to the Shipping Board by a proviso to Section 4 of said Act, which proviso reads:

> "Provided: That all vessels * * * assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction, or under contract by the War Department, shall be exempt from the provisions of this Act."

Since the vessels in dispute were not only "vessels assigned to inland waterways," but they were still in course of construction, as also under contract, when the Act of June 5, 1920, was passed, by the War De-

partment, to plaintiff here; for, on the second of the above propositions the bill before me says:

> "These vessels were not completed until long after said date (that is to say, May 28, 1919, the date of the contract) and were not delivered to plaintiff until July 15, 1922."

Whether this allegation is true or not, does not, of course, concern me now, because I am bound (as heretofore said) by what the petition alleges, so far as the motion to dismiss, at least, is concerned.

I am of opinion, then, that the title and ownership of these vessels (again, so far as such title and ownership could be predicated on the source of the money used to build them) was left by the Act of June 5, 1920, in the Fleet Corporation, and that the custody and control over them was in the War Department; that this custody and control in the War Department arose solely by reason of the fact that the $3,860,000.00 with which they were constructed, had been paid by the Fleet Corporation to the Chief of Engineers of the United States Army, and, since the Chief of Engineers of the United States Army was subordinate to, and acted under orders of the War Department. So far as I have been able to see, this chain of circumstances, and this alone, puts the custody and control of these vessels in the Secretary of War.

Some corroboration of this view is lent by some of the provisions of the so-called Transportation Act, of February 28, 1920 (Section 201, Act of February 28, 1920). By the provisions of the latter Act, all boats and vessels on inland waterways, which had come into the control of the United States by virtue of the pro-

visions of Paragraph 4, Section 6, of the Federal Control Act, or which had been built with any money out of the five hundred million dollars revolving fund provided by Section 6, *supra*, were transferred to the custody and control of the Secretary of War. But these vessels were not obtained pursuant to the provisions of Paragraph 4, Section 6 of the Federal Control Act, nor were they built out of any part of the revolving fund provided in said section 6 of the Federal Control Act.

This view is corroborated by a further provision of Section 201 of the Transportation Act, which does specifically deal with and refer to the vessels in dispute. This is clause (d) of said Section 201, which reads thus:

> "Any transportation facilities owned by the United States and included within any contract made by the United States, for operation on the Mississippi River above St. Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above St. Louis."

A further provision of said Section 201 of the Transportation Act, contained in clause (e) thereof provided, that all merchant vessels owned by the United States, in whole or in part, when operated by the Secretary of War, or by the Shipping Board, should be subject to all laws, regulations and liabilities, affecting, or applicable to, privately owned merchant vessels. But I put no stress upon this, for it so clearly

limits the laws, regulations and liabilities to admiralty laws and maritime regulations and liabilities, as that it can furnish no light here.

Moreover, this view is strengthened, and the application of even admiralty laws is modified, by the provisions of the Act of March 9, 1920 (41 Stat. 525) whereby, *inter alia*, it is provided, that no vessel of the United States, or of any corporation in which all the capital stock is owned by the United States, shall be proceeded against by any seizure in admiralty or *in rem*.

The above Act of March 9, 1920, recognized and dealt with the fact that when it was passed there were still in existence boats and vessels, the title and ownership whereof was in a corporation wherein all the capital stock was owned by the United States. This affords an additional reason for the view I have already expressed, that the Transportation Act did not transfer either the title, custody or control, of these vessels to the Secretary of War, but left such title, custody and control (particularly title) where they had always been. There can be, I think, no doubt that the Act of June 5, 1920, already discussed, did not transfer the vessels to the Shipping Board.

Since, from the view above expressed to the specific application of clause (d) of Section 201, *supra*, of the Transportation Act, to the vessels here in controversy, it may be argued, that this language completely forecloses any contention that the United States is not the owner of these vessels, I may observe in passing, that there can be no doubt, that the United States is the beneficial owner of them. It owns them because it owned, and now owns, all of the capital stock of the

Fleet Corporation, which furnished the money to build them, and because the United States appropriated all the money to the Fleet Corporation, which the latter ever used or ever had. But, in a sense, the United States was a *cestui que trust* of these vessels, holding, as said, the complete beneficial title thereto, while the Fleet Corporation, a *quasi* private corporation, was the trustee holding the legal title.

In such situation, both Congress and the United States dealt with these vessels as if the United States not only was the absolute owner of them (as it was, in effect), but had the legal title to them, also absolutely.

If the statutes above considered have been correctly interpreted by me; if I have not overlooked, in the confusing mass of statutes passed in an effort to return to pre-war normalcy, and in the face of lack of time for careful inquiry incident to the hundreds of other pressing matters and duties confronting me, some applicatory statute, I think a few enlightening principles have been established. These are:

(a) That the vessels here in controversy were built with money furnished by the United States Shipping Board Emergency Fleet Corporation.

(b) That the said Fleet Corporation was a *quasi* private corporation, in which all of the capital stock was owned by the United States;

(c) That all of the money with which the Fleet Corporation operated, came either out of the proceeds of the sale of certain Panama Canal bonds (Act of September 11, 1916, 39 Stat. 728), or was appropriated to the Fleet Corporation by Congress from the reve-

nues of the United States, by the Act of March 1, 1918 (40 Stat. 438) or, by the Act of July 1, 1918 (40 Stat. 634);

(d) That this money which so built these vessels, was turned over by the Fleet Corporation, for this purpose, to the Chief of Engineers of the United States Army, who is an officer of the United States, acting under and by orders from the Secretary of War;

(e) That these vessels being thus created and held, were chartered to plaintiff by the Chief of Engineers of the United States Army, who acted in such behalf by direction of the Secretary of War;

(f) That these vessels, being so under contract, did not pass to the Shipping Board, or to the custody and control of the Secretary of War, unconditionally;

(g) And that, the Secretary of War will only obtain unconditional custody and control of them when they shal have reverted to the United States, at or before the expiration of the contract existing, and here in question. Of course, it is not intended to be said, that since somebody must, in case of exigencies, act for the United States, that the Secretary of War has no power so to act.

In the late case decided by the Supreme Court of the United States, it was held that the Fleet Corporation could be sued, and that a suit against it was not a suit against the United States, within the rule that a sovereign may not be sued without its consent. (Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549).

This case here at bar, it is true, is not an action

against the Fleet Corporation directly, but it is an action concerning vessels constructed with the funds set aside for the Fleet Corporation. Neither is it a suit against the United States, directly. On the face of it, the action is no more directly against the United States than it is against the Fleet Corporation. Indirectly, it is against the Fleet Corporation, and not against the United States.

Numerous cases, some of which are relied on by counsel for defendants as on all fours with the case at bar, are called to my attention. Generally, these cases are of the type of Wells v. Roper, 246 U. S. 355; Oregon v. Hitchcock, 202 U. S., 60; Noganat v. Hitchcock, 202 U. S., 473; Stanley v. Schwalby, 162 U. S., 255; Louisiana v. Garfield, 211 U. S., 70; Louisiana v. McAdoo, 234 U. S., 627, all of which were cases dealing with rights, property and attributes of the United States accruing to it in its strict capacity as a sovereign. These cases dealt with lands, or titles thereto, held by the United States under allodial tenure as a sovereign, with vessels (*vide*, The Siren, 7 Wall. 152) captured by it in War, with import duties levied pursuant to constitutional grant of power, with matters pertaining to post-offices and post-roads, and others of a similar sort had, done and transacted by the United States pursuant to constitutional grant of power in its strict governmental capacity as a sovereign.

The case of Kaufman v. Lee, 106 U. S., 196, wherein suit was brought in ejectment against Kaufman, as the officer, agent and terre-tenant of the United States, which was the owner of lands held by it in fee, as a national cemetery, and for use in some obscure way

as a military reservation, and Stanley v. Schwalby, 162 U. S., 255, wherein a like suit to recover possession of land held for a fort by the United States, was brought against the terre-tenant, seem to illustrate the distinction.

In the former case it was said the suit could be maintained without joining the United States as a party, although the United States contended that it owned the land in controversy in fee. In the latter case it was held that the suit was one against the United States, and that it could not be maintained.

It is true, the Supreme Court of the United States does not put the distinction on any such ground as that referred to above, but to me it seems that the distinction perhaps subsists. The difference between the two cases, as they are distinguished by the Supreme Court in the Stanley case, is that in the Lee case the title of the United States was clearly bad, and that of the plaintiff therein clearly good; while in the Stanley case the converse was, respectively, present. Such a distinction seems unfortunate, for it would seem that, since the United States cannot be sued without its consent, no Court could ever get to the point of ascertaining whether the cause of action against it was good or bad. Having no jurisdiction to entertain the action at all, it would, by the same token, have no jurisdiction to ascertain whether the plaintiff had, or had not, a good cause of action, and the United States, the real defendant, a bad or worthless defense, which, after al is said, is the only subject of a lawsuit.

But the Lee case, *supra*, (Kaufman, the terre-tenant, alone was sued, and the United States, though it defended the action, expressly declined to submit to

the jurisdiction of the trial Court, though after adverse judgment below, it took an unwarranted writ of error) does hold that when the United States, acting from necessity through its officers, since it cannot function otherwise, takes the property of a citizen without due process of law, and without just compensation, and in utter disregard of right, of law and of constitutional guaranties, and so taking such property, attempts to retain it for and on the alleged behalf of the United States, the lawfulness of a possession so acquired, and the title to property so illegally, unrighteously and unjustly obtained, may be inquired into by the courts, even though the United States be not made, and cannot be made, a party to the action in which such inquiry is had.

This is, I think, the real, legal distinction between the Lee case and the Stanley case. So, should I in haste have erred in holding that the United States is not the lessor, by the terms of the charter-party, the Lee case is yet authority for the view that, by flagrant acts of its officers, through whom it alone can function, the United States may, in a sense, be estopped from benefiting by such unlawful and unconstitutional acts.

I am of opinion, that the facts alleged in the bill, when viewed in the light of the statutory history of the alleged title to these boats in the United States, furnish a sufficient reason why the United States is not a necessary party. Everybody, of course, concedes that, if it is a necessary party, then this Court has no jurisdiction; that it cannot be proceeded against without its consent, and that this consent, it is likewise conceded, has not been vouchsafed in this case.

But even if this fact of title in the United States be conceded as being absolute, even if the Sloan Shipyards case be not controlling, the right to the possession of these boats was in the plaintiff, until that right was by wanton force interfered with, without due process of law, and in utter disregard of the law, and of its processes. Not only were the boats taken, as the petition alleges, without any process of law, but they were taken in utter disregard of the instructions of the Secretary of War, which instructions ordered defendant, Ashburn, who actually did the taking, to institute legal proceedings for their recovery, in the event that plaintiff refused to deliver them up. Such proceedings as were actually ordered by the Secretary of War, would have constituted that due process of law, which the Federal Constitution vouchsafes to even the meanest of its citizens.

What was said by Mr. Justice Miller as to the facts and situation in the Lee case, particularly and peculiarly applies to the facts alleged in the petition here. That was a case, in the opinion of this Court, not nearly so flagrant as the one before me, but Mr. Justice Miller saw fit to characterize what was done in that case, in this pertinent and apposite language:

> "No man," said Mr. Justice Miller, "in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound

to submit to the supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this Court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged rights of the judiciary to decide in proper cases statutes which have been passed by both branches of Congress, and approved by the President, to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of a Government without lawful authority, without process of law, and without compensation, because the President has ordered it, and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty, and the protection of personal rights."

But little can be added to language like this. It fits the case at bar, as the case at bar is pleaded, and with the latter, at this stage, I repeat, I am alone concerned. Certainly no Government, which with mighty hand compels its citizens to abide by the law, ought itself, in time of peace, to break its own laws, or refuse to follow itself that law which it compels others to abide by. Neither can the Government afford to take the unlawful fruits accruing from illegal acts perpetrated by

those who assume to act for it, and in its name. Even if it should be conceded, for the sake of argument, that no action could be maintained by plaintiff, nor anyone else, affecting the title or possession of these vessels in dispute, or affecting the charter-party, or its construction, without the United States were a party, if defendants had come lawfully into possession of them, yet this would not at all militate against the view that a possession obtained, as here, can be examined into by the courts. Since the taking is alleged to have been done by force, and unlawfully, without due process of law, and without regard to the law, and without regard to the instructions, even of the Secretary of War, who advised, and, until lately, at least, countenanced only lawful re-possession, the presumption ought to be entertained, that the acts of defendant were not done by and with the consent of the United States, but, on the contrary, were done against its will and consent.

It is persuasive, that a similar view, in a very similar case, has lately been taken by Judge Baker, United States District Court of the Northern District of West Virginia.

However, if no other reasons could be given for this view, except those of a profound respect for the law, and its processes, and a profound respect for the honor and dignity of this government, these alone ought to suffice.

Without more, I am of the opinion, that the motion to dismiss on the grounds now urged by defendants, ought to be overruled, and so it will be ordered.

April 30, 1923.
St. Louis, Missouri.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

UNITED STATES HARNESS COMPANY, A CORPORATION,

Against

W. A. GRAHAM, F. F. SCHOWDEN AND JAMES R. SHEPHERD, JR.

} In Equity

BAKER, J.

This is a suit instituted in the Circuit Court of Jefferson County, by United States Harness Company v. W. A. Graham, F. F. Schowden and James R. Shepherd, Jr., alleging that on September 24, 1920, plaintiff entered into a contract with the Government of the United States of America, acting by and through E. C. Morse, Director of Sales, Supply Division, General Staff, he being then and there contracting officer on behalf of the Government, acting by and under the authority of the Secretary of War, for the sale of certain harness, saddles, leather, spare parts for harness and saddles, hardware and accessories, cut leather stock, etc., fully set out and enumerated in contract filed as "Exhibit A" with plaintiff's bill. And on December 9, 1920, two supplementary contracts were entered into by and between said parties, copies of which

said supplementary contracts are filed as "Exhibits B and C" with plaintiff's bill, whereby certain other harness and other equipment was sold to the plaintiffs by the United States of America by and through said E. C. Morse, Director of Sales.

Pursuant to said contracts plaintiff proceeded to conduct the business covered thereby, receiving from time to time goods and property from the Government at its factories at Ransom, in Jefferson County, and proceeded to remanufacture and make suitable for commercial and industrial purposes such parts thereof as required such remanufacture, and to sell the same to various parties at various places throughout the United States.

Complainant alleges that in conducting said business it has accounted for regularly to the Government, and paid over to it, all money to which the Government has been entitled under the terms of said contract, and has, in all respects and at all times, fully and completely performed its part of said contract.

Complainant further alleges that on June 14, 1921, the President of the United States signed an order declaring void the same contract, without giving it an opportunity to be heard and without assigning any sufficient reason for said action, which said order is in words and figures following:

THE WHITE HOUSE.

"By virtue of the power vested in me, I hereby declare void, the contract of September 24, 1920, and the two contracts of December 9, 1920, between the Director of Sales of the War Department and the United States Harness Company.

(Signed) Warren G. Harding."

That pursuant to said executive order, Hon. John W. Weeks, Secretary of War of the United States of America, issued the following order:

"Lt. Col. Wm. A. Graham, July 14, 1921.
Judge Advocate General's Office,
Washington, D. C.

You will proceed to Ransom, W. Va., at which place is located the plant of the United States Harness Company. Upon arrival at that place you, in company with a representative of the Department of Justice and an officer of the Quartermaster Corps, will, **in the name and by the authority of the President of the United States, demand from the United States Harness Company, immediate possession of certain property of the United States** now located upon the premises of said company, being property involved in the three certain alleged contracts between the Director of Sales of the War Department and the said Harness Company, one being dated September 24, 1920, and two dated December 9, 1920, which said alleged contracts were, on the 14th day of June, 1921, declared void by the President of the United States.

"Upon such demand the officer of the Quartermaster Corps will immediately, unless oposed by force of legal process, take physical possession of said property for and in the name of the United States, and at once remove the same from the premises of the United States Harness Company by causing the same to be loaded into trucks or other vehicles of the United States, to be furnished for that purpose.

"By direction of the President.

(Signed) John W. Weeks,
Secretary of War."

That on the 15th day of July, 1921, the said W. A. Graham, Lt. Col. of the Judge Advocate General's Office of the United States Army, F. F. Schowden, being a major in the Quartermaster Corps of the United States Army, and James R. Shepherd, Jr., being an employee and representative of the Department of Justice of the United States Government, accompanied by numerous soldiers, arrived at complainant's factory at Ransom and entered, unlawfully, upon the property of complainant, and announced that they would proceed to enter upon complainant's property and all parts thereof against its protest. And proceeded to take possession of and move away property and goods of great value, which complainant alleged it had lawfully in its possession under said contract with the United States Government, and which was delivered to it by the United States Government in pursuance to said contracts. And which complainant had stored on its premises awaiting remanufacture or sale in its present condition, in pursuance to said contracts.

That said representatives of the United States Government, and soldiers under their orders, unlawfully entered upon complainant's premises and threatened to, and actually did, take possession of said property and goods and interfered with complainant's business in all other respects, bringing unfair disrepute upon its good name and destroying the good will of its customers, all which was irreparable loss and injury to complainant.

That complainant protested against the action of said defendants and ordered them off its premises, but said defendants, by virtue of the force of armed men, disregarded complainant's protests and order.

Complainant further alleges that it is advised and believes that the order of the President of the United States aforesaid, dated June 14, 1921, was made without constitutional authority on the part of the President and is illegal and void; that the United States Government is bound by said contracts and cannot avoid or evade the same without depriving complainant of its vested rights under the Constitution and Laws of the United States.

Complainant prays that an injunction be issued at once against the said defendants restraining and prohibiting them, either themselves or any soldiers or agents acting under their orders, from entering upon its premises and from remaining thereon, and restraining and preventing them from interfering with taking posession of any property upon complainant's premises or in its lawful possession. And further restraining and prohibiting them from retaining or removing beyond the limits of Jefferson County any such property which they already had removed from complainant's premises, and for such further and general relief as to equity shall seem meet.

On July 15, 1921, J. M. Woods, Esq., Judge of the Circuit Court of Jefferson County, West Virginia, granted the injunction as prayed for in said bill and enjoined and prohibited, until further order of the Court, W. A. Graham, F. F. Schowden and James R. Shepherd, Jr., either themselves or by soldiers or agents or employes acting for or under them, from entering upon the premises of said United States Harness Company in said Jefferson County and from interfering with or taking possession of any property on said premises or elsewhere in the possession of the

United States Harness Company, and from remaining upon said premises and from retaining possession or removing outside the limits of Jefferson County any property already taken from said United States Harness Company before the service of said order.

Said injunction order further provided that before it should be effective, plaintiff should give bond before the Clerk of the Circuit Court of Jefferson County in the sum of $2,500.00, conditioned according to law, with security to be approved by the Clerk. Bond was immediately given as provided by said order, and said injunction order was served upon F. F. Schowden and James R. Shepherd, Jr., by delivering to each of them in person, in Jefferson County, a true copy thereof on July 15, 1921, at four (4) o'clock P. M., the said W. A. Graham not being found in said county.

On July 21, 1921, the United States of America through Stuart W. Walker, District Attorney for the Northern District of West Virginia, served notice on the complainant United States Harness Company that on the 23rd day of July he would move the Judge of the Circuit Court of Jefferson County, in vacation, for an order removing said cause to the District Court of the United States for the Northern District of West Virginia.

On July 23, 1921, petition for removal was regularly filed and motion made for removal of said cause to the United States District Court for the Northern District of West Virginia, copy of President's order being filed with said petition for removal marked "Exhibit A" and copy of order of Honorable John W. Weeks, Secretary of War, directed to Lt. Col. W. A. Graham,

dated July 14, 1921, was duly filed with said petition marked "Exhibit No. 2."

Upon consideration of said petition and motion, the Circuit Court of Jefferson County entered an order removing said cause to the District Court of the United States for the Northern District of West Virginia.

On July 27, 1921, Stuart W. Walker, Esq., United States Attorney for the Northern District of West Virginia, and as such attorney for the defendants, served notice upon complainant that on the 2d day of August, 1921, at ten o'clock, A. M. or soon thereafter, he would move the Judge of the United States District Court for the Northern District of West Virginia, at the Government Court Room in Martinsburg, West Virginia, to dissolve the injunction previously entered in the cause of the United States Harness Company v. W. A. Graham and others, and to dismiss said cause, for the reason that said suit is in effect one against the United States and involves the property rights of the United States, and for other reasons apparent upon the face of the bill and exhibits therewith filed.

On August 2, 1921, at the Government building in Martinsburg, pursuant to said notice motion was made by W. A. Graham, F. F. Schowden and James R. Shepherd, Jr., defendants, by Stuart W. Walker, United States Attorney, and as such attorney for defendants, to dismiss this cause for the reason that the averments of the bill do not constitute such facts as show a valid cause in equity and for the following reasons:

1. It plainly appears from the bill and exhibits filed therewith that this suit is one involving substantial

property rights and interests of the United States Government, and therefore while nominally a suit against the individual defendants, is in fact one against the United States.

2. That the same is prosecuted without the consent of the United States.

3. There is no allegation of fact in the bill sufficient to constitute a cause of action against the United States.

4. The bill is one for an injunction only and no other relief is specifically prayed for in the bill.

5. The suit is a subterfuge as one against the defendants individually in an effort to give jurisdiction to this Court, which would not have jurisdiction of the suit if it were instituted directly against the Government.

6. This Court is wholly without jurisdiction to entertain the suit.

Said motion was exhaustively argued by counsel for both plaintiff and defendants, and briefs filed.

CONSIDERATION OF CASE.

Upon considering the matters thus far involved in this suit, I am confronted with Article 5 of the Constitution of the United States, wherein it states:

> "No person shall * * * be deprived of life, liberty or property, without due process of law * * *"

In construing the meaning and extent of protection under this provision of the Constitution against action without due process of law, it has always been recognized that one who has acquired rights by administrative or judicial proceedings cannot be deprived of them without notice and opportunity to be heard.

The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law.

It is unnecessary to recite the decisions in which this principle has been repeatedly recognized.

It is enough to say that its binding obligation has never been questioned by the highest court in our land.

Note the President's order: "By virtue of the power vested in me, I hereby declare void the contract of September 24, 1920, between the Director of Sales of the War Department and the United States Harness Company. (Signed) Warren G. Harding."

Also note the language of the order executed by John W. Weeks, Secretary of War, directed to Lt. Col. Wm. A. Graham, Judge Advocate:

> "You will proceed to Ransom, W. Va., at which place is located the plant of the United States Harness Company. Upon arrival at that place, you, in company with a representative of the Department of Justice and an officer of the Quartermaster Corps, will, in the name and by the authority of the President of the United States, demand from the United States Harness Company immediate possession of certain property of the

United States now located upon the premises of said company, being property involved in the three certain alleged contracts between the Director of Sales of the War Department and the said Harness Company, one being dated September 24, 1920, and two dated December 9, 1920 which said alleged contracts were, on the 14th day of June, 1921, declared void by the President of the United States.

Upon such demand the officer of the Quartermaster Corps will immediately, unless opposed by force of legal process, take physical possession of said property for and in the name of the United States, and at once remove the same from the premises of the United States Harness Company by causing the same to be loaded into trucks or other vehicles of the United States, to be furnished for that purpose.

By direction of the President.

(Signed) John W. Weeks, Secy. of War."

There is no man in all this land, in my opinion, who would more graciously accord to a citizen the right to question, in good faith, the authority of any of his acts, more quickly than President Warren G. Harding. There is no man who would be slower than the President to deny the right of the citizen to seek the protection of Courts against an unlawful invasion of property, even though that invasion was founded upon his own edict. Neither would he criticize any citizen for respectfully, but nevertheless firmly, refusing to bow to the mandate of an unconstitutional or illegal order even though it bore his signature.

"By virtue of the power vested in me, I hereby declare void the contract of September 24, 1920, and the two contracts of December 9, 1920, between the Director of Sales of the War Department and the United States Harness Company." Is that order a usurpation of that power which is reposed under our Government only in the judicial branch, and never constitutional in the executive branch?

Is the citizen to be denied his right of intervention and protection from the judiciary solely because the President has signed a paper that would strike down the claimed vested legal property rights of a citizen?

Can contracts alleged to have been legally entered into between citizens and duly authorized representatives of the Government be declared void by the President without resort to the judiciary and an opportunity being given those claiming vested rights thereunder to be heard?

I do not think so.

The motion to dissolve the injunction and dismiss this suit must be overruled, under the present state of the pleadings.

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CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

IN THE MATTER OF THE PETITION OF THE United States of America, as owner of nineteen barges and four towboats. } No. 23, Original.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The suit sought to be prohibited by this proceeding is one brought by Edward F. Goltra in the District Court of the United States for the Eastern District of Missouri against John W. Weeks, Secretary of War; Col. T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States attorney for that district.

Prior to May 28, 1919, the date of the contract in controversy, the United States Shipping Board Emergency Fleet Corporation had allotted, out of funds appropriated to it by the Government, to the Chief of Engineers of the United States Army, $3,860,000

for a fleet of 4 towboats and 19 barges, for the primary purpose of transporting iron and coal to and from St. Louis, Mo., as an emergency of war then existing. Contracts were let with private parties for the construction of the fleet. Upon the signing of the armistice the emergency passed, at which time the barges were nearing completion, and, in order to utilize them, the boats and barges were let by the contract in controversy to the complainant, Goltra. This contract is set out in extenso in the bill of complaint which forms a part of this record.

The contract is stated therein to be "between the *United States of America*, represented by Maj. Gen. William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War," and *Edward F. Goltra*, of the city of St. Louis. The contract thereupon sets out certain previous relations between the parties, the allotment of the $3,860,000 for the construction of the towboats and barges, the letting of the contracts for the construction of the barges, the construction of the towboats for the utilization of the barges, and the passing of the emergency of war. The contract thereupon recites that the lessor charters and leases to the lessee the said boats and barges for a term of five (5) years after the delivery of the first barge or towboat to the complainant.

The contract provides that the net earnings, after deducting operating expenses and maintenance, shall be deposited with the Treasurer of the United States to the credit of the Secretary of War until such time

as the net earnings shall equal the full amount of the cost of the vessels, plus interest at 4 per cent.

Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if desired by the lessee, a board of arbitrators to be selected by the parties shall appraise the value of the fleet, and the lessee is given the *right* or option of purchasing the fleet, with respect to which purchase it is provided that if the sums deposited with the Treasurer by the lessee shall equal the full amount of the cost of the vessels, plus interest, the same shall be applied as payment in full for the fleet; any earnings above that amount to belong to the lessee. If the funds are not equal to the cost, plus interest, but are greater than the appraised value, the whole funds shall belong to the United States and the fleet shall thereupon become the property of the lessee. If the funds are less than the appraised value, they shall be applied to the purchase price at the appraised value and the deficiency paid by the lessee to the United States, in which event the fleet is to be his property. In the event that the funds are unequal to the appraised value, the deficiency payments are to be made by the lessee over a period of fifteen (15) years in equal installments, with interest, the title to the property remaining in the United States until the payment of the whole purchase price.

One of the arguments and covenants of the contract is "*that the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries*

for the period of the lease and of any renewals thereof, transporting iron, ore, coal and other commodities"; that the lessee shall pay all operating expenses and maintain the fleet in good operating condition and provide insurance for the benefit of the United States. Various other provisions for the protection of the United States are contained in the lease which are not necessary to the consideration of the question here presented.

Section 8 of the contract is as follows:

> The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.

On May 15, 1922, the complainant took possession of the boats under the contract.

On March 3, 1923, the Secretary of War served notice upon the complainant that, in his judgment, the complainant had not complied with the terms and conditions of the contract, *in that he had failed to operate the towboats and barges as a common carrier,* declaring that the contract and the supplement

thereto were terminated, and demanding the delivery of the possession of the towboats and barges to the United States. A similar notice (in view of the contention of the complainant that the Chief of Engineers, and not the Secretary of War, had the right to terminate the contract) was signed by Lansing F. Beach, Chief of Engineers, on April 27, 1923, and delivered to Mr. Goltra on April 30, 1923.

On March 25, 1923, the defendant Ashburn, pursuant to instructions from the Secretary of War, took possession of the towboats and barges, as he contends, without violence or show of force, but as complainant contends, otherwise. On the same day the bill of complaint was presented to the Hon. C. B. Faris, judge of the Eastern District of Missouri, and the mandatory and restraining order, set forth in the record herein, was issued and served upon Colonel Ashburn and Mr. Carroll. This order restrained the defendants from interfering with the possession of the complainant and commanded the return of the boats already taken.

Afterwards the appearance of the Secretary of War was entered in the cause.

At all stages of the proceeding the defendants, by motion to dismiss and otherwise, asserted that this proceeding was, in essence and effect, although not nominally, a suit against the United States and its property. The pleadings raising these questions are set forth in the record filed herewith. This contention was denied by the District Court and the motion

to dismiss overruled. A stay of proceedings has been allowed in order to permit the presentation of this petition to this court.

I.

RIGHT TO PROHIBITION.

We shall hereinafter undertake to satisfy the court that if the suit in controversy is in essence and effect one against the United States, then the District Court of the United States is without jurisdiction, and prohibition will lie. Thereafter we hope to demonstrate that the suit is in effect a suit against the United States.

It may be said by opposing counsel that in view of the right to appeal or in error, the discretion of the court should be exercised against the writ. Granting the existence of the right of final review, we say that the right is inadequate to the needs of the situation as here presented, which, with accompanying lack of jurisdiction in the court below, clearly justifies the writ.

The situation brought about by the institution of the suit and the mandatory injunction issued in connection therewith, is such that prohibition is the only remedy which can afford practical relief. The nineteen (19) barges and four (4) towboats, which are the subject matter of this controversy, are without doubt the property of the United States. They were built at an expense of approximately $3,800,000, all moneys of the United States. They are capable of being used in connection with commerce and trans-

portation upon the Mississippi River, and their construction was initiated and completed with that very purpose in view. The contract in question was expressly made in furtherance of that purpose, and the action taken by the officers of the United States, authorized by the contract itself, was taken because of complainant's failure to attempt to carry out this purpose.

While the boats are still in the possession of the officers of the United States they are, under the orders of the District Court, being held in harbor within the jurisdiction of that court, and so are incapable of being used in commerce and transportation. A motion is pending to require the return of the boats to complainant.

The litigation with respect to the right to cancel the contract with Goltra, unless disposed of in this proceeding, will undoubtedly be carried to the court of final resort by whichever party may lose in the courts below. In the meantime any possession of the boats, either by the United States or by the complainant, will be subjected to the vicissitudes of the litigation, and at any stage of the proceeding their possession may be taken from one party and transferred to the other, as the particular court dealing with the situation may view the right of the controversy.

The character of the use to which the boats are susceptible is such that no practical service can be furnished by them unless the party holding possession has the unquestioned and uninterrupted right of

possession. If the possession is for the time being left in the United States, it, in order to advantageously use the boats, must enter into contracts with shippers looking to their future use, the performance of which contracts may be jeopardized by the loss of that possession and consequent liability for damages to be adjudged in the Court of Claims as for breach of contract.

The same is true with respect to the possession by Mr. Goltra. He would be at all times, until the end of this litigation, in the position of one holding property which could not be adequately and serviceably used. In order to use this property as a common carrier he would have to comply with the regulations of the Interstate Commerce Commission and with the Shipping Act, and be prepared to perform the contracts and the service which he is permitted to make and render. Therefore, so long as this litigation is pending and undetermined, the use of this valuable property, in which the public is interested from the standpoint of service and the Government from that of revenue, is entirely destroyed, no matter in whose possession it may temporarily be placed, the property itself being affected also by the depreciation and injury incident to nonuse. For these reasons we say that there is *no adequate remedy* by appeal, or error, or certiorari, as the very prolongation of the litigation tends to the destruction of its subject matter.

The situation apparent here, resulting in the tying up of the boats, the consequent loss to the United

States of revenues from use, and the loss to the public in the deprivation of the service which they might render, is such that the discretion of the court, if the view obtains that the right is discretionary and not absolute, ought to be exercised favorably to the writ.

Recurring to our first proposition, we say that if the suit is in essence and effect one against the United States, then the District Court is without jurisdiction and prohibition will lie.

The remedy of prohibition is expressly given by section 234 (sec. 1211) of the Judicial Code in matters of admiralty jurisdiction.

Section 262 (sec. 1239) of the Judicial Code provides that:

> The Supreme Court and the Circuit Courts of Appeals and the District Courts shall have power to issue all writs not specifically provided for by statute, and which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.

Under the authority of this section, the jurisdiction of the Supreme Court to issue writs of prohibition in respect to common law and equity proceedings is sustained.

In *Naganab* v. *Hitchcock*, 202 U. S. 473, the court in holding that the court below had no jurisdiction of a suit which was against the United States, said:

> Without considering whether the courts would have power to control the action of the

> Secretary of the Interior in this matter, or whether the power and authority so to do is purely political and subject to the control of Congress without judicial intervention, as was held in the Court of Appeals, we are of opinion that there *is no jurisdiction to entertain this case*. In respect to this question it is on all fours with *State of Oregon* v. *Ethan Allen Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office*, decided on April 23 of this term (202 U. S. 60). * * * Upon the authority of the *Oregon* case we hold that there is *no jurisdiction to maintain the present suit*, and the action of the Court of Appeals of the District of Columbia, affirming the decree of the Supreme Court of the District dismissing the complainant's bill, is *affirmed*.

In *Smith* v. *Whitney*, 116 U. S. 167, which was not an admiralty proceeding, it was said:

> But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right.

In *In re Rice*, 155 U. S. 396 (not an admiralty proceeding), it was said:

> Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and

has no other remedy is entitled to a writ of prohibition as a matter of right.

In Matter of Simons, 247 U. S. 231, was an application to this court for mandamus, or, if that be denied, for prohibition, to prohibit the District Court from proceeding with a cause which petitioner claimed had been erroneously transferred from the law side to the equity side of the court. The court held that the District Court had no right or power to transfer the cause from the law to the equity side of the court and that it was immaterial what form of extraordinary remedy was afforded to grant relief, although mandamus was adopted as the remedy in that instance.

The court said:

> If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake.

In Ex Parte State of New York, 256 U. S. 490, this court, in dealing with a jurisdictional question identical with the one here—that is, lack of jurisdiction because the proceeding was, in effect, a suit essentially, but not formally, against the State, and in which a right of appeal existed—said:

> The want of authority in the District Court to entertain these proceedings * * * and the fact that the proceedings are in essence

> against the State without its consent is so evident that, instead of permitting them to run their slow course to final decree, with inevitably futile result, the writ of prohibition should be issued, as prayed.

In *In re Railroad Company*, 255 U. S. 273, it was held that prohibition would lie to determine the question of the lower court's jurisdiction to proceed against petitioner in a cause in which petitioner claimed it had not been served with process, although in that particular case the rule was discharged and the petition dismissed because it appeared that the petitioner below had filed certain motions and taken certain other steps in the cause which might have constituted a general appearance, and it was held to be within the province of the District Court to determine whether petitioner had in fact entered its general appearance in the cause despite the fact that it had not been served with process. It was there said:

> There is a well-settled rule by which this court is guided upon applications for a writ of prohibition to prevent a lower court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein. If the lower court is clearly without jurisdiction, the writ will ordinarily be granted to one who, at the outset, objected to the jurisdiction, has preserved his rights by appropriate procedure, and has no other remedy.

In *In the Matter of Walter Patterson*, 253 U. S. 300, it was held that this court had jurisdiction by man-

damus or prohibition to determine the power and jurisdiction of the District Court to refer, over petitioner's objection, a cause on the law side of the court to an auditor to make a preliminary investigation as to the facts, hear the evidence, and report his findings, with a view to simplifying the issues for the jury. The court said:

> Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was held in Ex parte Simons, 247 U. S. 231, 239, "be dealt with now, before the plaintiff is put to the difficulties and the court to the inconvenience that would be raised by a proceeding that ultimately must be held to have been required under a mistake." The objection to our jurisdiction is unfounded.

It, therefore, appears that prohibition is the proper remedy for the situation here, whether the writ is viewed as one of right or as dependent upon the discretion of the court, provided the suit is one in essence against the United States.

II.

IS THE SUIT IN QUESTION ONE AGAINST THE UNITED STATES?

No one will deny that a sovereignty such as the United States or the constituent States can not be sued either in its own courts or in the courts of another sovereignty without its consent having been expressly given. So it can not be denied that if the suit, although nominally not against the sovereignty, is so in essence and effect, then such suit can not be maintained. These propositions are supported by abundant authorities, which we will hereafter present. So that the vital consideration is to determine whether or not this suit is one in essence and effect against the United States. That question can best be determined by a consideration of the bill of complaint. Let us proceed to analyze that bill for the purpose of ascertaining just what it is.

In the first place, it will be noted that the three defendants are officials of the United States, impleaded as such. The bill recites, in a preliminary way, the situation antecedent to the making of the contract which is the basis of the suit, and which is set out early in the bill. The contract is between the United States and Edward F. Goltra, and its terms have been sufficiently set forth in our statement.

Paragraph 1 of the contract provides that it is covenanted and agreed between the parties "that *the said lessees shall operate as a common carrier the said fleet of three or four towboats and barges* upon the

Mississippi River for the period of the lease, or of any renewals thereof, transporting iron, ore, coal, and other commodities."

Paragraph 8 of the contract is as follows:

> 8. The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; *and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor,* and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.

The bill then sets out a supplementary contract which deals with the contemplated erection of unloading facilities at St. Louis, the details of which are not necessary to be specifically referred to, except that it is provided in substance, as in paragraph 8 of the first contract, that the lessor may retake possession of the unloading facilities as is provided in said paragraph 8 of the first contract with reference to the boats.

The bill then proceeds to allege that after the complainant had taken over said towboats and barges he was interfered with by the officers of the United States, particularly the Secretary of War, in performing the duties and obligations imposed upon him by the said contract, the details of which are not

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necessary to specifically narrate, except that it is averred that by the

> acts of the said John W. Weeks, acting as Secretary of War, and other representatives of the War Department, the plaintiff was wrongfully deprived by the lessor in said contracts from carrying out the terms and conditions of the said contracts as a common carrier, or as a private carrier, or in any other manner provided by said contracts; and it became and was and is impossible for the plaintiff to so carry out the contracts under the terms and conditions thereof, unless and until the *lessor* therein, *being the United States*, causes and permits the plaintiff to carry out the conditions of said contracts in manner and form and for the purposes contemplated by said contracts.

Complainant thereupon avers that said contracts constitute in law a contract of charter and lease together with a contract of privilege and option in the complainant to purchase the boats on the terms and conditions therein stated, and that said contract established in the complainant a fixed and definite property right in said towboats and barges, of which the complainant could only be lawfully deprived "by a proceeding in equity for an accounting and a determination by a decree of court of the *lawful interest of each of the parties thereto in the subject matter of said contracts.*"

The bill thereupon alleges that the defendants did, on March 3, 1923, wrongfully and unlawfully undertake to declare said contracts terminated, and did de-

mand from the complainant the immediate possession of the said boats without warrant of law, and threatened to take the same by force, and had actually begun the taking of the same, pursuant to said demand at the time of filing the bill.

The bill thereupon sets forth the notification of date March 3, 1923, of the Secretary of War to the complainant, and the memorandum of the said Secretary of War to the defendant Ashburn.

Following that the bill sets out the reply of the complainant to said communication.

Thereupon the bill charges as follows:

> Plaintiff further avers that the United States, *acting through its lawfully authorized representatives*, has not at any time fulfilled the said two contracts of May 28, 1919, and May 27, 1921, by putting the plaintiff into a position or allowing him to take a position where he could carry out the conditions of said contracts, either as a common carrier or as a private carrier under said contract as defined in section 2 (a) of the original contract of May 28, 1919.

Thereupon, the bill alleges the conspiracy between the defendants to deprive the complainant of his property, without due process of law, and the taking possession of the boats.

The prayer of the bill is for a restraining order, without notice, enjoining the defendants from interfering with the possession by the complainant of the boats and barges, commanding them to return those taken and restraining the *defendant Secretary of War*

"from doing any act whatsoever *looking to the cancellation or other termination of said contract* of May 28, 1919, and said supplemental contract of May 27, 1921, *between the United States and said plaintiff*," and enjoining the defendant Ashburn from doing any act in aid of the purpose of said Secretary of War to terminate said contracts and from further interfering with the possession by complainant.

The prayer finally concludes with the following:

> The plaintiff prays that on final hearing of this cause of action a decree may be entered in favor of the plaintiff and against the defendants and each of them, which *shall determine the rights of plaintiff as set forth herein under said contracts*, and perpetually enjoin and restrain the said defendants from interfering in any way with said rights.

This bill is in legal effect one to specifically enforce the contract set forth therein and to restrain the exercise by the opposite party, the United States, of its contractual right to terminate the contract for compainant's failure to perform the very service primarily contemplated by the contract of lease, which service is expressly covenanted to be performed by the lessee, for the reason that the conditions justifying the termination of the contract did not exist, inasmuch as the lessee's failure to perform was occasioned by acts of noncooperation or of frustration on the part of the United States. In other words, the bill proceeds upon the theory not that the *right* to declare the contract terminated did not

exist at all, but that a state of fact from which the right might arise did not exist, as had been so determined by the Secretary of War, thereby putting in issue the soundness of the conclusions of the Secretary of War in the exercise of his discretion and judgment upon questions of fact.

That this is the position of the complainant and of his bill is evidenced by the following allegations:

> And said contracts established in the plaintiff, by virtue of their terms and conditions and of the considerations moving the plaintiff and the United States thereunto, a fixed and definite property right in said towboats and barges and in said unloading facilities and in the land on which said unloading facilities were constructed, of which rights, respectively, the plaintiff could not be lawfully deprived, except by a proceeding in equity for an accounting and a determination by a decree of court of the lawful interest of each of the parties thereto in the subject matter of said contracts. And the plaintiff avers that notwithstanding such rights in the plaintiff, the defendant, John W. Weeks, *purporting to act as Secretary of War of the United States*, and the defendants, Col. T. Q. Ashburn, *purporting to act as Chief of Inland and Coastwise Service*, and the defendant, James E. Carroll, purporting to act as United States district attorney for the Eastern Division of Missouri, acting each for himself and in combination one with another, on or about the 3d day of March, 1923, and thereafter *did wrongfully and unlawfully undertake to declare said contracts terminated* and

> did demand from the plaintiff the immediate possession of the said boats without warrant of law and did wrongfully and unlawfully and arbitrarily threaten to take by force the said towboats and barges and unloading facilities described in said two contracts and did cause to be begun the actual seizure of some of said towboats and barges by persons pretending and *purporting to represent the United States and acting under instructions of the said defendants herein.*

It is also evidenced by the complainant's reply to the Secretary of War's demand for the possession of the boats which, not denying the contract *right* to terminate the contract, says:

> The exercise of your judgment is, I am convinced, based upon the inadequate and inaccurate information, and has, in fact, no substantial basis upon which to rest.

That the courts will not interfere with the exercise of the judgment and discretion of officers of a sovereignty is well settled in the decisions of this court.

In *Louisiana* v. *McAdoo, Secretary of the Treasury*, 234 U. S. 633, this court said:

> There is a class of cases which hold that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of the official is sought is

> one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution.

So, too, in the recent case of *Wells* v. *Roper*, 246 U. S. 335 (of which we shall have more to say hereafter), in dealing with the question of its right to review the exercise of judgment and discretion conferred upon an official, not by law, but by *contract*, as in this case, this court said:

> It can not successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding for the purposes of the argument, that *the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States.*

When the allegations of the bill in this case are considered with any care, it is obvious that it is not one to restrain officious, unauthorized intermeddlers, acting entirely without authority, from interfering with complainant's rights by the unlawful seizure of

his property, and, as such, against them individually, but in essence it is one to prevent or review the exercise of official discretion by officers because of the existence of facts which did not, as claimed, justify it as exercised.

The final decree, if one be passed in this case, would be to declare the right of the complainant to the avails of the contract; that is, the possession and the right to operate the boats, and to restrain the defendants as officers from declaring a forfeiture and retaking possession of the boats, as is provided in the contract.

If the contracting parties in this case were Mr. Goltra and the corporate owner of these boats, and the defendants were the officers and agents of the corporate owner, could it for a moment be said that a bill of this sort would lie without making the corporate owner a party? The answer is obvious, because the bill would be one to specifically perform a contract and to adjudicate the lack of right and power to terminate it, which relief could only be had against the other party to the contract. So we say in this case that the United States, as owner, is a necessary and indispensable party to this bill, for that the relief sought is in effect a decree against it, and not against the individual or official defendants.

The defendant officers have no interest in the subject matter of the contract or in the controversy, except as their duty may require them as representatives of the Government to exercise discretion

under the contract. In the exercise of this discretion they act for the United States. The United States could only exercise its right of cancellation through its proper officers, and its exercise being a matter of discretion and not a mere ministerial act, it is the act of the United States and not subject to review by the courts.

If the lessor were an individual or private corporation, and a situation arose as here, the lessor would be a necessary party, and the decree would be primarily against it, and incidentally only against its agents. The lessor here being the Government can not be made a party defendant, and yet the decree would operate against and bind it as fully as if it were, for those who alone may act for it are bound, and so it is bound. A contract right belonging to the Government with respect to its own property, necessarily by reason of its movable character always in possession of human agencies, would be denied in a proceeding to which it is not a party. Such a result could only be where it in essence is a party.

THE DECISIONS.

The cases dealing with the question as to whether or not suits against officers of a State, or the United States, are, in effect, suits against the sovereignties themselves, seem to classify themselves under three heads:

(1) Those holding that suits to enjoin the performance of official or discretionary duties of officers and agents of the sovereignty are, in effect, suits

against the sovereignty and can not be maintained without its express consent.

(2) Suits involving property rights of the sovereignty which can not be maintained without such consent.

(3) Suits affecting actions of officers and agents of the sovereignty when such actions are illegal, arbitrary, purely ministerial or otherwise in excess of authority, which are not, in effect, suits against the sovereignty.

It is our contention that this proceeding comes within one or the other, or both, of these first two classifications.

In *Hagood* v. *Southern*, 117 U. S. 52, the State of South Carolina issued bonds which provided that they should be receivable in payment of taxes. It was also provided in the act authorizing the issuance of these bonds that an annual tax of 3 mills for every dollar of taxable property should be levied to secure the redemption of such bonds. Subsequently the State repealed the act for the levy of a tax of 3 mills for the redemption of such bonds and enacted a statute providing that such bonds should not be receivable in payment of taxes. The plaintiffs as owners of these bonds thereupon instituted suit against defendants as officials of the State to compel them to levy the 3-mill tax for the redemption of these bonds and to accept the same in payment of taxes. The court held that the suit could not be maintained because it was, in effect, a suit against

the State of South Carolina, which had not given its consent to be sued.

The court said (l. c. 67):

> These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses; and, except with that consent, it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the eleventh amendment to the Constitution of the United States.
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> * * * * *

> If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in Federal tribunals, it is difficult to conceive the frame of one which would be. If the State is named as a defendant, it can only be reached either by mesne or final process through its officers and agents, and a judgment against it could neither be obtained nor enforced, except as the public conduct and government of the ideal political body called a State could be reached and affected through its official representatives. A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the State according to the dictates and decrees of the court, is, if anything can be, a judicial proceeding against the State itself. If not, it may well be asked, what would constitute such a proceeding?

In re Ayers, 123 U. S. 443.

The State of Virginia issued bonds in which it was provided that the coupons thereto should be receivable by the State in payment of taxes. The plaintiffs were the purchasers of a large number of these bonds, some of which they sold to residents of the State at discount, to be used by the purchasers in payment of their taxes. Shortly after the purchase of these bonds the State of Virginia passed an act prescribing certain conditions which should be complied with before the coupons on these bonds should be receivable in payment of taxes, which were so

stringent as to nullify, in effect, the provisions of the bonds that the coupons thereto should be receivable in payment of taxes. The plaintiffs thereupon instituted suit to enjoin the attorney general and other officials of the State of Virginia from instituting actions for the collection of taxes against these residents of Virginia who had tendered these coupons in payment of their taxes, asserting, inter alia, that the subsequent conditions imposed by the State as a prerequisite to the right to have these coupons accepted in payment of taxes and the institution by defendants of actions for the recovery of taxes against residents of Virginia, who had tendered coupons in payment of their taxes, would impair the obligation of, and constitute a breach of, the contracts represented by the bonds.

The court held that this suit was against the State of Virginia, and, as that State had not consented to the institution thereof, it could not be maintained. The court said (l. c. 502):

> Admitting all that is claimed on the part of the complainants as to the breach of its contract on the part of the State of Virginia by the acts of its General Assembly, referred to in the bill of complaint, there is, nevertheless, no foundation in law for the relief asked. *For a breach of its contract by the State, it is conceded there is no remedy by suit against the State itself.* This results from the eleventh amendment to the Constitution, which secures to the State immunity from suit by individual citizens of other States or aliens. This immunity

includes not only direct actions for damages for the breach of the contract brought against the State by name, but all other actions and suits against it, whether at law or in equity. A bill in equity for the specific performance of the contract against the State by name, it is admitted, could not be brought. In *Hagood* v. *Southern*, 117 U. S. 52, it was decided that in such a bill, where the State was not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where "the things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State," the court was without jurisdiction, because it was a suit against a State.

The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State.

* * * * *

> But where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution.

In *Wells* v. *Roper*, 246 U. S. 335, decided in 1918, the Supreme Court held that where the First Assistant Postmaster General, in accordance with a decision of the Postmaster General, undertook to terminate an existing contract for automobile mail service at Washington, D. C., to make place for a similar service to be conducted by the department under a special appropriation, his action being based upon the supposed authority of the contract itself, and being purely official, discretionary, and within the scope of his duties, a suit to restrain him from annulling the contract and from interfering with its further performance was in effect a suit against the United States and was therefore properly dismissed.

This case is so like the Goltra case that we think it advisable to quote at length from the pertinent ex-

pressions of this court upon the question now under consideration (p. 337):

> The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract and thus prevent the inauguration of the experimental service contemplated by the act of 1914—a direct interference with one of the processes of government. The argument to the contrary assumes to treat defendant not as an official but as an individual who, although happening to hold public office, was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. Indeed, it was only because of his official authority that plaintiff's interests were at all endangered by what he proposed to do.
>
> That the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain. And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties. It can not successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be

taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. *And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States.* (See *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 171, and cases cited; *Belknap* v. *Schild*, 161 U. S. 10, 17, 18; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620.)

The United States has consented to be sued in the Court of Claims and in the District Courts upon claims of a certain class, and not otherwise. Hence, without considering other questions discussed by the courts below or raised by appellant in this court, we conclude that the dismissal of the bill was not erroneous.

By Executive order dated March 12, 1919, President Wilson did, in connection with the towboats and barges mentioned in the bill of complaint, "withdraw from the United States Shipping Board such part of the said power and authority so vested in me (him) under said laws with reference to the operation, management, and disposition of vessels as relates to such river barges and towboats, and do (did) hereby delegate to the Secretary of War the

power and authority so withdrawn from the United States Shipping Board, to be by the Secretary of War executed through contract or otherwise, as in his judgment may be most economical and advantageous to the United States."

Such is the authority for the making of the contract involved herein.

It is provided in the Transportation Act of 1920, Title II, section 201 (d), as follows:

> Any transportation facilities owned by the United States and included within any contract made by the United States for operation on the Mississippi River above St. Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above St. Louis.

The towboats and barges involved in this controversy are the only facilities within the description of this section, and are the facilities so referred to.

The case of *Wells* v. *Roper*, 246 U. S. 335, is in our opinion on all fours with this case. The facts in this case are, if anything, stronger than in that. In this case the boats are the property of the United States, and, even if Mr. Goltra should exercise his option, they remain the property of the United States until fully paid for. The right to the cancellation of this contract and to the return of the boats and barges to the United States was a stipulation of the

contract itself. Under this right of cancellation and to retake possession, the Government has taken and is in possession of the boats and barges. The complainant's reply to the Secretary of War set forth in the bill and the whole frame of the bill disclose that the position of the complainant is that the complainant has complied with his contract, and that the *right* to the cancellation of the contract has not accrued. This was the contention of the complainant in the Wells-Roper case, which the Supreme Court met in very apt language in the closing paragraph of its opinion, wherein it says:

> *And neither the question of official authority, nor that of official discretion, is affected, for present purposes, by assuming or conceding for the purposes of the argument that the proposed action may have been unwarranted by the terms of the contract, and such as to constitute an actionable breach of that contract by the United States.*

In *The Siren*, 7 Wall. 152, a boat belonging to the United States collided with and sunk a boat owned by private parties. The court held that a libel in rem against the boat of the United States would not lie without the consent of the Government. It was said (l. c. 153):

> It is a familiar doctrine of the common law that the sovereign can not be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public

service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the Government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the Nation of the United States. They can not be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States* v. *Clarke*.

The same exemption from judicial process extends to the property of the United States, and for the same reasons.

* * * * *

For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault in favor of the injured party. This claim may be enforced in the admiralty by a proceeding in rem, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, can not be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the Government, incapable of enforcement without its consent, and unavailable for any purpose.

* * * * *

> So, also, express contract liens upon the property of the United States are incapable of enforcement. A mortgage upon property, the title to which had subsequently passed to the United States, would be in the same position as a claim against a vessel of the Government, incapable of enforcement by legal proceedings. The United States, possessing the fee, would be an indispensable party to any suit to foreclose the equity of redemption, or to obtain a sale of the premises.

It was held, however, that the rule which precluded a suit against the United States did not apply where the United States itself instituted suit. In such instances it was held that private persons might offset against the claim of the Government any claim which they in turn had against the United States. In this case, the boat in question was a prize of war, and, upon reaching port, a libel in prize was filed against her and she was condemned and sold. It was accordingly held that the parties owning the boat which was sunk had a claim against the proceeds realized from the sale of *The Siren*, on the ground that the institution by the United States of a libel in prize against her was the institution of an action by the United States and was within the qualification or exception to the general rule, and entitled the owner of the sunken ship to damages out of the money realized upon the sale of the boat.

Oregon v. *Hitchcock, 202 U. S. 60.*

The State of Oregon instituted suit against Hitchcock, Secretary of the Interior, to enjoin him from allotting certain lands to Indians within the limits of the Klamath Reservation in the State of Oregon, which claimed that the land in question was swamp and overflowed land which had been granted by the United States to Oregon upon its admission into the Union, and that the title to such land was therefore in the State. The court held:

1. That while the suit was nominally against the Secretary of the Interior, the United States was the real party in interest, and the suit was in reality against the United States, because the legal title to the land in question was in the United States.

2. That a suit could not be maintained against the United States without its consent.

The court said:

> The question of jurisdiction in a case very similar to this was fully considered in *Minnesota* v. *Hitchcock, supra*. There, as here, a State was plaintiff, and the suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections 16 and 36 in what was known as the "Red Lake Indian Reservation." This suit is brought by a State against the same officers to restrain them from allotting and patenting in severalty swamp lands within the Klamath Indian Reservation. In that case we said (p. 387):
>
> "Now, the legal title to these lands is in the United States. The officers named as defend-

ants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered."

Naganab v. *Hitchcock, 202 U. S. 473.*

This was a suit by the plaintiff, a member of the Chippewa Indian Tribe, to enjoin the defendant Hitchcock, Secretary of the Interior, from executing a certain act of Congress, and to compel him to account under the act of January 4, 1889, for the proceeds of the sale of land the title to which was in the Government. The court held that since the title to the lands in question was in the United States, the suit was against the United States, which could not be sued without its consent, and said:

It is apparent from the above statement of the allegations of the bill that the defendant Hitchcock, Secretary of the Interior, has no

interest in this controversy and that it is in effect a suit against the United States to control the disposition of the lands and for an account of the proceeds of the sales of certain lands conveyed by the Indians to the United States under the act of January 14, 1889. Without considering whether the courts would have power to control the action of the Secretary of the Interior in this matter, or whether the power and authority so to do is purely political and subject to the control of Congress without judicial intervention, as was held in the Court of Appeals, we are of opinion that there is no justification to entertain this case. In respect to this question it is on all fours with *State of Oregon* v. *Ethan Allen Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office*, decided on April 23 of this term (202 U. S. 60). That case was distinguished from *Minnesota* v. *Hitchcock*, 185 U. S. 373, relied on here by the appellant, in the fact that in the *Minnesota case* the jurisdiction to sue the Secretary of the Interior was sustained because of the consent on the part of the United States to be sued in respect to school lands within an Indian reservation and an acceptance by the Government of full responsibility for the result of the decision, so far as the Indians were concerned (act of March 2, 1901, 31 Stat. 950). In this case, as in the *Oregon case*, the the legal title to all the tracts of land in question is still in the Government, and the United States, the real party in interest herein, has not waived in any manner its immunity or

consented to be sued concerning the lands in question, and there is no act of Congress in any wise authorizing this action. Upon the authority of the *Oregon case* we hold that there is no jurisdiction to maintain the present suit, and the action of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court of the District dismissing the complainant's bill is *affirmed.*

Stanley v. *Schwalby, 162 U. S. 255.*

This was an action in trespass to try title to certain land occupied by the defendants as officers of the United States. The record title to the land in question was in the United States in fee simple. The plaintiff, on the other hand, claimed title in fee simple to a certain portion of the land by virtue of a prior unrecorded deed from the original owner of the party and asserted that the United States had notice of her prior deed at the time it acquired title to the property. The United States was not formally made a party to the action, but the district attorney, acting under instructions, undertook to intervene in the action as a party defendant.

The court held that as the title to the land was in the United States, the suit, although nominally against the officials of the United States, was in reality against the Government, which could not be maintained without its consent.

The judgments of the courts of the State of Texas appear to have been largely based on *United States* v. *Lee* (106 U. S. 196), above

cited. In that case, an action of ejectment was brought in the Circuit Court of the United States against officers occupying in behalf of the United States lands used for a military station and for a national cemetery. The Attorney General filed a suggestion of these facts, and insisted that the court had no jurisdiction. The plaintiffs produced sufficient evidence of their title and possession, and the United States proved no valid title. This court held that the officers were trespassers, and liable to the action, and therefore affirmed the judgment below, which, as appears by the record of that case, was simply a judgment that the plaintiffs recover against the individual defendants the possession of the lands described, and costs. And this court distinctly recognized that, if the title of the United States were good, it would be a justification of the defendants; that the United States could not be sued directly by original process as a defendant, except by virtue of an express act of Congress; and that the United States would not be bound or concluded by the judgment against their officers (106 U. S. 199, 206, 222).

* * * * *

In the case at bar, the United States, and their officers in their behalf, claimed title in the whole land. The plaintiffs claimed title in one undivided third part only. The final decision below was against the claim of the intervenor for another third part of the land. It was thus adjudged that the United States had the title in that part, if not also in the remaining third,

> to which no adverse claim was made. Such being the state of the case, the final judgment in favor of the plaintiffs for the third part awarded to them, and for possession of the whole jointly with the individual defendants, was directly against the United States and against their property, and not merely against their officers.

In *Carr* v. *United States*, 98 U. S. 433, 437, the court said:

> We consider it to be a fundamental principle that the Government can not be sued except by its own consent; and certainly no State can pass a law, which would have any validity, for making the Government suable in its courts. It is conceded in *The Siren* (7 Wall. 152) and in *The Davis* (10 id. 15) that without an act of Congress no direct proceeding can be instituted against the Government or its property. And in the latter case it is justly observed that "*the possession of the Government can only exist through its officers;* using that phase in the sense of any person charged on behalf of the Government with the control of the property, coupled with actual possession." If a proceeding would lie against the officers as individuals in the case of a marine hospital, it might be instituted with equal facility and right in reference to a post office or a custom-house, a prison or a fortification.
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> The cases like *The Siren* and *The Davis*, already referred to, and many others therein cited, in which the proceeds of Government

property, incidentally brought into the admiralty, have been subjected to the liens of claimants against the same, stand upon the principle that when the Government itself seeks its rights at the hands of the court equity requires that the rights of other parties interested in the subject matter should be protected. *The Siren* was brought into the port of Boston as prize, was libeled, condemned, and sold, and the proceeds paid into court. In distributing these proceeds amongst those who had claims against the vessel, an allowance was awarded for damages to the owner of another vessel which had been sunk by collision with *The Siren* during her voyage subsequent to the capture. It was held that inasmuch as the United States had resorted to the aid of the court to procure the condemnation of *The Siren*, and had thus placed her proceeds in the course of judicial administration, any proper claims against the vessel itself, prior to that of the Government, might well be satisfied out of such proceeds. At the same time it was conceded that neither the Government nor its property can be subjected to direct legal proceedings without its consent; and that whosoever would institute such proceedings must bring his case within the authority of some act of Congress (7 Wall. 154). *The Davis* and her cargo were seized for salvage services. Part of the cargo was cotton belonging to the United States, but not in its actual possession, it being in the possession of the master of the ship under a contract of affreightment. The Government appeared as

> claimant; and it was held that the cotton, like other cargo, was justly liable to pay its proportion of the salvage services; the court, at the same time, as before stated, holding that even for salvage services the property of the Government could not be taken out of its own possession by any direct proceeding.

In *Louisiana* v. *Garfield*, 211 U. S. 70, it was held that a bill brought by the State of Louisiana against Garfield, Secretary of the Interior, to establish title to, and prevent other disposition of, lands claimed under swamp-land grants, was in reality a bill against the United States, which could not be maintained without its consent.

See also, to the same effect, *New Mexico* v. *Lane*, 243 U. S. 52.

Goldberg v. *Daniels*, 231 U. S. 218, was a petition in mandamus to compel Daniels, Secretary of the Navy, to deliver the United States cruiser *Boston* to petitioner, in which it was asserted that after survey and condemnation the cruiser had been condemned; that thereafter, and in accordance with the acts of Congress, the Secretary of the Navy had advertised the cruiser for sale and that plaintiff was the highest bidder, and that he was therefore entitled to the boat. The court held that as the cruiser in question was the property of the United States the suit could not be maintained, and said:

> The United States is the owner in possession of the vessel. It can not be interfered with behind its back, and as it can not be made a party this suit must fail (*Belknap* v. *Schild*,

161 U. S. 10; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 606; *Oregon* v. *Hitchcock*, 202 U. S. 60, 69; *Naganab* v. *Hitchcock*, 202 U. S. 473, 476).

Belknap v. *Schild, 161 U. S. 10, 11.*

In this case the plaintiff, as owner of a patent for a caisson gate, brought suit against the defendants, alleging that they had infringed his patent rights and asking for an injunction and damages. The defendants were officials of the United States and averred that the only caisson gate that was under their supervision and control was located in a navy yard belonging to the United States, and that the gate had been built by other parties under a contract with the United States.

It was held that the grant of letters patent entitled the grantor to the exclusive right to the patent as against the world; that as the United States has consented, by various statutes, to the institution of suits against it upon their contracts, it might, therefore, be sued by a patentee for the use of his invention under a contract made with him by the United States or its authorized officers; that the exemption of the United States does not protect their officers from being personally liable to an action of tort by a private person whose rights of property have been invaded, but that the United States is not liable for, nor consented to be sued for, wrongs done by its officials in the discharge of their duties.

It was accordingly held that in so far as the defendants had themselves infringed plaintiff's patent

rights the suit was not against the United States, but was against the defendants personally. However, it was held that with respect to the injunction sought to restrain the use of the gate in question, the suit was against the United States because the United States owned the property.

The court in this connection said (l. c. 24):

> In the present case, the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the property of the United States and held and used by the United States for the public benefit. If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. *The United States could not hold or use it, except through officers and agents.* Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction and for the destruction of the gate in question the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; *the United States were the only real party against whom alone in fact the relief was asked and against whom the decree would effectively operate;* the plaintiff sought to control the

> defendants in their official capacity and in the exercise of their official functions as representatives of the United States and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare, and therefore the United States were an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court, above cited.

In *Louisiana* v. *McAdoo*, 234 U. S. 627, it was held that a suit against the Secretary of the Treasury to review his action in determining the rate of duty to be collected, under statutes and treaties, on an imported article, which action involved judgment and discretion, and to mandamus him to collect a specific amount, is in effect a suit against the United States, and that as the case did not come within any of the exceptions to the established rule that the United States can not be sued without its consent, it was properly dismissed.

RESPONDENT'S AUTHORITIES.

Most of the authorities cited by respondent are cases of injunction or mandamus against Cabinet officers or others to require them to perform a purely ministerial act requiring no judgment or discretion, or cases to restrain them from abusing or overstepping their lawful powers. We have no quarrel with these

cases. If a Cabinet officer, under a mistaken view of his legal authority in connection with one of the duties of his office, does what the law prohibits, he, like anyone else, is to be restrained, and a suit for this purpose is not one against the United States. Such a suit was *Philadelphia* v. *Stimson*, 223 U. S. 605. This is not such a suit. By this suit the plaintiff seeks to restrain the Secretary of War from taking action authorized by a contract of the United States upon the ground that this action was an abuse of his judgment and discretion. This, under the authorities heretofore cited, the courts will not do.

We respectfully submit that the court should issue its permanent writ of prohibition as prayed for in the petition.

HARRY M. DAUGHERTY,
Attorney General.
JAMES M. BECK,
Solicitor General.
LON O. HOCKER,
Special Assistant to the Attorney General.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA, AS OWNER OF NINETEEN BARGES AND FOUR TOWBOATS.	No. 23

RETURN OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI AND THE HONORABLE CHARLES B. FARIS, JUDGE THEREOF

Now comes the District Court of the United States for the Eastern District of Missouri and comes Honorable Charles B. Faris, Judge of said Court, and, for their return to the order to show cause why a writ of mandamus and/or a writ of prohibition should not be granted, show unto the Honorable Court here, that in the matter concerning which they have been cited to appear, they proceeded with, and were proceeding in the proper exercise of their jurisdiction in such matters conferred upon them by law, and that there is no

valid reason why the rule, heretofore made upon them, should be made absolute.

The respondents admit that one Edward F. Goltra commenced a civil suit in the respondent court as alleged in the petition for a Writ of Prohibition and that Exhibit No. 1, set forth on page 13 of said petition, is a true copy of the bill of complaint filed by said Goltra. The respondents admit that the allegations in said petition concerning the contents of said bill of complaint are generally correct, with the exception of the statement that, "the right was reserved to the lessor in said contract to terminate said lease and retake possession of said boats and barges if in the judgment of the lessor, the said Edward F. Goltra had not complied with the terms and conditions on his part to be performed thereunder," which statement the respondents say was not in the bill of complaint as an examination of Exhibit No. 1 discloses.

The respondents further admit the issuance of the mandatory and restraining order and order to show cause, March 25th, 1923, as alleged as set forth; the filing of the suggestions of the Attorney General of the United States, Exhibit 2, as set forth; the filing of the returns of Col. T. Q. Ashburn and John W. Weeks, Secretary of War of the United States, Exhibits 3 and 4, as set forth; the filing of the defendant's motion to dismiss the proceedings, Exhibit 5, as set forth, and the overruling of said motion April 30th, 1923.

The respondents further state that they have no knowledge whether or not Maj. Gen. Lansing H. Beach, Chief of Engineers of the United States Army on April 27th, 1923, or at any other time terminated or can-

celled said contract for, or on behalf of, the United States and show to this Honorable Court that such letter of cancellation, if true, never appeared before the respondents, and neither it nor the Petitioner's Exhibit No. 6, is any part of the record in this case and has never been filed. Further the respondents say that said Exhibit No. 6 does not purport to be certified as a true copy of any document and the petitioner does not state in its petition that it is a part of the record in the proceedings before the respondents; that said Exhibit No. 6 was inserted between exhibits certified to by the Clerk of these respondents and Exhibit No. 6 is expressly excepted from said certification.

These respondents further say that the civil suit commenced by said Goltra against said Col. T. Q. Ashburn, John W. Weeks and James E. Carroll is not a suit against the United States, but one in which, by bill of complaint, the complainant alleges the right of possession of the towboats and barges in the complainant Goltra, and that the individual defendants, Col. T. Q. Ashburn, John W. Weeks and James E. Carroll, were unlawfully combining and conspiring to deprive the complainant of his property without due process of law; that in pursuance of their unlawful purpose they had, with force and violence, and against the protest of the complainant, taken possession of a portion of said towboats and barges and caused them to be towed or hauled away, that while complainant's bill was in the course of preparation, the defendants were proceeding, with a large force of men, to take away from complainant and remove from St. Louis all of the remaining towboats and barges, all of which more fully appears by said bill of complaint, Exhibit No. 1.

That these respondents have held and decided that said suit of said Edward F. Goltra was not a suit against the United States, but one against individual defendants who were alleged to be depriving said Edward F. Goltra of his property in violation of law.

That these respondents aver that there is an adequate remedy by appeal.

These respondents say that they are, now and at all times, ready and willing to obey whatever orders this Honorable Court may see proper to make in the premises; and aver that they issued the orders, in said suit of Edward F. Goltra, as they believe they had the right to do, relying upon the authority of the decisions of this Honorable Court and other courts; and having fully made return respectfully pray to be discharged.

United States District
Court for E. Dist of Mo
By C. B. Faris Judge
C B Faris

Respondents.

Jas. D. Davis
Douglas M. Robert
Chas. D. Carlton Allen

Attorneys for Respondents.